INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, *Petitioner*

v.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A Corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,[1] prays that a writ of certiorari

[1] The functions of the United States Employees' Compensation Commission were transferred to the Federal Security Agency effective July 16, 1946. 1946 Reorganization Plan No. 2, Section 3, 11 F. R. 7873, 60 Stat. 1095. On the same day a Bureau of Employees' Compensation was established and the essential functions of the compensation commission were assigned to the director of the bureau. Federal Security Agency Order 58, 11 F. R. 7943.

issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 20, 1948.

OPINION BELOW

The opinion of the district court (R. 9-12) is reported at 68 F. Supp. 616. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21-23) is reported at 166 F. 2d 13.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1948 (R. 24). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

QUESTION PRESENTED

Section 8(f)(1) of the Longshoremen's and Harbor Workers' Compensation Act provides: "If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury". As defined elsewhere in the Act, "disability" means a reduction in earning capacity "because of injury"; and "injury" means "accidental injury or death arising out of and in the course of employment".

An employee who had previously lost the sight of his right eye became permanently and totally disabled through the loss of the sight of his left

eye in an industrial accident. The previous loss of sight in the right eye did not result from an injury in the course of employment. The question presented is whether the court below erred in holding that the term "previous disability" in Section 8(f)(1) includes a prior physical injury not arising "out of and in the course of employment", and hence limits the employer's liability only to compensation for the partial disability caused by the subsequent injury.

STATUTE INVOLVED

Relevant portions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 15-17.

STATEMENT

This suit was brought to review a compensation award under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901, *et seq.* (R. 2). John Davis, an employee of the Suwannee Fruit & Steamship Company, sustained an injury by accident, in circumstances entitling him to compensation under that Act, which resulted in the permanent loss of vision in his left eye (R. 6-9). At the time the employee sustained this injury he had already lost the sight of his right eye (R. 3). Blindness in his right eye, however, had not been caused by any injury compensable under the Longshoremen's and Harbor Workers' Compensation Act or any other compensation act, and no compensation benefits had been paid to the employee on account of the loss of vision in his right eye (R. 4). The loss of sight in the em-

ployee's left eye, combined with the pre-existing blindness in his right eye, rendered him permanently and totally disabled (R. 6).

On May 14, 1945, the Deputy Commissioner for the United States Employees' Compensation Commission, Sixth Compensation District, awarded the employee compensation for the loss of sight in his left eye (R. 3). At the same time it was ordered that the case be held open in order to determine whether an additional award should be made for permanent total disability or for permanent partial disability (R. 3). On January 31, 1946, it was found that the employee was permanently and *totally* disabled, and an award of $8.00 per week during the continuance of the total disability was made against the employer and its insurance carrier, the Fidelity and Casualty Company of New York (R. 6-7).

The employer and the insurance carrier brought suit to set aside the award imposing liability for total permanent disability on the ground that their liability was limited to compensation for the disability which would have resulted from the injury to the employee's left eye (R. 4). The district court denied a motion to dismiss the complaint and upheld this claim in reliance on Section 8(f)(1) of the Act (33 U. S. C. 908(f)(1)) (R. 11). The Government's claim that "previous disability" in Section 8(f) was to be interpreted in accordance with the statutory definitions and thus limited to prior industrial injuries was rejected; the exemption was considered applicable regardless of the

origin of the prior physical defect (R. 12). The employer was held liable only for compensation for permanent partial disability for the loss of an eye and the remainder of compensation for permanent total disability was directed to be paid from the special fund created by Section 44 of the Act (R. 11-12; 14). Since there were no issues of fact and the deputy commissioner did not desire to plead further, the award was set aside as requested (R. 14). This judgment was affirmed by the court below (R. 21-23).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to direct the district court to dismiss the complaint.

2. In holding that the employer and the carrier were not liable for compensation for permanent total disability to the injured employee.

3. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The record does not disclose the specific cause of the "previous disability." The complaint recites that at the time of the accident the employee "had already lost the sight of his right eye," that the blindness in this eye had not been "caused by an injury by accident arising out of and in the course of his employment" and was not "compensable under the Longshoremen's and Harbor Workers' Compensation Act * * * or any other

compensation act," and that no compensation benefits had been paid for the loss of vision in this eye (R. 3-4). Neither the findings of fact in the compensation award nor the opinion of the district court sheds additional light on whether the sight of the right eye was lost through disease, nonindustrial accident or congenital defect (R. 5-6, 9). The decision of the court below must therefore be taken to mean that any physical defect existing at the time of an industrial injury, whatever the cause, is a "previous disability" within the meaning of Section 8(f) and, to the extent that it contributes to the consequences of the industrial injury, requires a *pro tanto* reduction in the employer's liability.

1. The broad construction of "previous disability" by the court below is, as the court below indicated (R. 23), in direct conflict with the recent decision of the Court of Appeals for the District of Columbia in *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, certiorari denied, 325 U. S. 857, and is out of harmony with decisions of the lower federal courts dating back to the early days of the Longshoremen's and Harbor Workers' Compensation Act. *Grays Harbor Stevedore Co.* v. *Marshall*, 36 F. 2d 814 (W. D. Wash.); *Liberty Stevedoring Company* v. *Cardillo*, 18 F. Supp. 729 (E. D. N. Y.); *Wood Preserving Corp.* v. *McManigal*, 39 F. Supp. 177 (W. D. Ky.); *Seime-Spokane Co.* v. *Marshall*, Civil Action No. 640 (W. D. Wash.) (decided April 1, 1943, not re-

ported): *Tennessee River Co. v. La Garde*, 65 F. Supp. 161 (D. Minn.).

In the *National Homeopathic* case the employee had suffered previous accidents not connected with any employment which resulted in the amputation of his left leg and left arm and in the fracture of his right kneecap. In the course of his employment, he again fractured his right kneecap. This fracture, because of the previous fracture and amputations, resulted in permanent total disability. The award of the deputy commissioner imposing liability for permanent total disability upon the employer and the insurance carrier was upheld. Contrary to the decision of the court below, the Court of Appeals for the District of Columbia held that the provision of Section 8(f)(1) of the Act, limiting an employer's liability where the permanent total disability resulted from the combination of a previous disability and the subsequent injury, did not apply unless the prior physical defect resulted from an accidental injury arising out of and in the course of employment. The court reached this conclusion by interpreting "previous disability" in Section 8(f), in accordance with the definitions contained in Section 2 of the Act, discussed *infra*, p. 9.

The other decisions also involved situations in which an industrial injury in combination with a pre-existing physical impairment resulted in a greater disability than the subsequent injury alone would have produced. In all of them the courts held the prior defect not to be a "previous disabil-

ity" within the meaning of Section 8(f) and refused to abate the employer's liability for the full consequences of the injury.

Claims involving prior physical defects are constantly arising and the conflict of the decision below with the decisions of other federal courts should be resolved to establish the proper standards to be applied by the deputy commissioners in making awards and to permit a uniform construction and administration of the Act in the several compensation districts.

2. The decision below seems to be wrong as a matter of statutory construction. Under the language of Section 8(f) the employer is required to "provide compensation only for the disability caused by the subsequent injury" if the employee was suffering from "a previous disability" at the time of the subsequent injury. In the event the subsequent injury itself would cause only permanent partial disability but combined with the previous disability results in permanent total disability, the employer pays compensation for the permanent partial disability and "the remainder of the compensation that would be due for permanent total disability * * * shall be paid out of the special fund established in section 44." Section 8(f)(1). In all other cases in which an injury follows a previous disability the employer is relieved from liability for the full consequences of the sub-

[2] The subject has received considerable attention in decisions, statutes and industrial studies. See Dodd, *Administration of Workmen's Compensation* (1936), pp. 662-680.

sequent injury without provision for additional compensation to the employee from any other source. Section 8(f)(2).

It is the Government's contention that, under the definitions in the Act, the limitation of the employer's liability provided by Section 8(f) applies only where the "previous disability" has resulted from a prior industrial accident. Although the term "disability" in its ordinary sense might conceivably embrace a physical impairment of any character, however created, this meaning "is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The statute provides that "when used in this Act * * * 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury" and that "the term 'injury' means accidental injury or death arising out of and in the course of employment." Section 2(2) and (10).

Applying these definitions, the phrase "previous disability" in Section 8(f) means a previous incapacity to earn wages because of an industrial injury. Only by rejecting these definitions can it be held that the exemption applies regardless of the nature and origin of the prior physical impairment. Ordinary rules of statutory construction do not furnish a basis for abandoning these statutory definitions. The structure of the statute suggests that "disability" in Section 8(f) has the same meaning as in other parts of the statute. Section 8

deals in its entirety with "compensation for disability." The term "disability" is used frequently throughout the section in its statutory sense. There would seem to be little justification for changing this meaning in one sub-section of an otherwise consistent pattern without some statutory indication that this was intended. The statute affords no evidence of such an intention.

The construction of "previous disability" which we urge has been adopted not only in the several federal court decisions referred to above but also in decisions of the state courts of New York interpreting a comparable relieving provision in its workmen's compensation law.[3] These decisions consistently refuse to reduce the employer's liability where the previous physical impairment was "not caused by an industrial accident." *In Belle*

[3] The New York statute has frequently been referred to as the model for the federal law. See, *e.g.* H. Rep. 1357, 70th Cong., 1st sess., p. 2; *Hartford Accident & Indemnity Co.* v. *Hooge*, 85 F. 2d 411 (App. D. C.); *Employers' Liability Assur. Corp., Ltd.* v. *Monahan*, 91 F. 2d 130 (C. C. A. 1); *Luckenbach S. S. Co., Inc.* v. *Marshall*, 49 F. 2d 625 (D. Ore.). New York Workmen's Compensation Law, Section 15(7), provides as follows: "The fact that an employee has suffered *previous disability* or received compensation therefor shall not preclude him from compensation for a *later injury* nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a *previous disability* shall not receive compensation for a *later injury* in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." [Italics supplied]

v. *Britton Stone & Supply Corp.*, 247 App. Div. 843; *Van Oosterhout v. Sisters of the Good Shepherd*, 249 App. Div. 898; *Berrilacqua v. Clark*, 225 App. Div. 190, affirmed, 250 N. Y. 589; *Pyshanck v. Henry Forge & Tool, Inc.*, 272 N. Y. 546, affirming 247 App. Div. 842; *Finegan v. Mintern & Son*, 270 App. Div. 868; with *Schavick v. Bayer Co.*, 272 N. Y. 217, compare *Anderson v. Babcock & Wilcox Co.*, 256 N. Y. 146. But cf. *Lehman v. Schmahl*, 179 Minn. 388.

The interpretation of Section 8(f) by the court below, by enlarging the employer's exemption from liability for some of the consequences of industrial accidents, defeats in some measure the social policy of the workmen's compensation laws to relieve employees of the burden of industrial accidents. *National Homeopathic Hospital Ass'n v. Britton*, *infra* at 564. The limitation on liability also runs counter to the usual rule of liability in tort and workmen's compensation laws. *Restatement of Torts, Negligence*, § 461; Harper, *Law of Torts* (1933) §§ 113, 129, 214. Under this and other workmen's compensation statutes, the courts have frequently rejected as a defense to a compensation award an employee's prior physical infirmity. This has been so where the subsequent disability would not have occurred but for the prior physical defect (*Pacific Employers' Ins. Co. v. Pillsbury*, 61 F. 2d 101 (C. C. A. 9); *Hoage v. Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co. v. Hoage*, 75 F. 2d 677 (App. D. C.),

certiorari denied, 295 U. S. 733; *Hoage v. Royal Indemnity Co.*, 90 F. 2d 387 (App. D. C.), certiorari denied, 302 U. S. 736) and where the extent of the disability has been increased because of the previous disability. *Warlop v. Western Coal & Mining Co.*, 24 F. 2d 926 (C. C. A. 8); *New Amsterdam Casualty Co. v. Cardillo*, 108 F. 2d 492 (App. D. C.); *Great Atlantic & Pacific Tea Co. v. Cardillo*, 127 F. 2d 334 (App. D. C.). In many cases presenting factual situations virtually identical with that in the instant case, where the employee had previously lost the use of one eye or some other member and thereafter lost the remaining member in an industrial accident, the employer has been held liable for compensation for total and permanent disability. See, *e.g.*; *Killisnoo Packing Co. v. Scott*, 14 F. 2d 86 (C. C. A. 9); *Moore v. Western Coal Mining Co.*, 124 Kans. 214; *Liptak v. Industrial Accident Comm. of California*, 200 Cal. 39; *In re Braconnier*, 223 Mass. 273; *Wabash Railway Co. v. Industrial Commission*, 286 Ill. 194; *Nease v. Hughes-Stone Co.*, 114 Okla. 170. Although these decisions did not involve the interpretation of a relieving provision comparable to Section 8(f), they reflect the general policy of the workmen's compensation statutes.

Since Section 8(f) provides an exception to the usual rule of compensation for industrial injury and operates contrary to the workmen's compensation principle of relieving employees of the burdens of industrial accidents, it should be strictly construed. *National Homeopathic Hospital Ass'n*

v. *Britton*, 147 F. 2d 561, 564 (App. D. C.); *Liptak v. Industrial Accident Commission*, 200 Cal. 39; cf. *Phillips Co. v. Walling*, 324 U. S. 490, 493; *Piedmont & Northern Railway Company v. Interstate Commerce Commission*, 286 U. S. 299, 311. If permitted to stand, the decision below will encourage employers to oppose awards in cases where an employee's disability has been increased because of a previous heart ailment, arthritic condition or other internal disease or physical anomaly. The allowance of such claims to reduced compensation will not only create a departure from existing law (see cases cited pp. 11-12, *supra*), but will impose on the deputy commissioners the frequent and virtually impossible task of apportioning a disability between an injury and a prior ailment. Cf. *Schavick v. Bayer Co.*, *supra*. Accordingly, the phrase "previous disability" in Section 8(f) should be interpreted in the light of the statutory definitions. The exemption, properly construed, is applicable only where an employee's physical incapacity results from a prior industrial accident for which, presumably, he has received compensation. In disregarding the statutory definitions of "disability" and "injury" and holding in effect that the employer's liability must be reduced wherever an employee's physical defect, regardless of its nature or origin, increases the extent of the disability, the court below appears to have extended the exemption beyond the limits marked by Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

May, 1948.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, *et seq.*, provides, in part, as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * * *

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * * *

(f) Injury increasing disability. (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subse-

quent injury: *Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

* * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

* * * * *

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act.

* * * * * * *

(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

* * * * * * *

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.